No. 21556

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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LEE HERMAN and VICTOR HERMAN,

*Appellants,*

*vs.*

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

*Appellees.*

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## APPELLANTS' CLOSING BRIEF.

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### Prefatory Statement.

In their brief, the Appellee insurance companies have asserted two major premises: 1. That there was evidence justifying the verdict, even if the polygraph evidence were to have been excluded; and, 2. That the polygraph evidence was properly admitted pursuant to stipulation.

Apparently, Appellees do not contest the California law which has been remarkedly critical of polygraph evidence and which has steadfastly restricted its admissibility because of the basic unreliability of the alleged "science". Nor do Appellees question the Appellants' statement of California Law relating to stipulations and the requirement that they be signed or assented to by the *attorney of record* of the party to be bound by the stipulation. Appellees ignore the point raised by Appellant that where a party is represented by an attorney of record, the party cannot enter into a stipulation affecting the conduct of the action.

## The Admission of the Polygraph Evidence Was, in Itself, Prejudicial and Reversible Error.

Appellees have attempted to cite other evidence in the record that they feel would justify the verdict. However, if the admission of the polygraph evidence was in error, which Appellants insist it was, then it was error of such magnitude as necessarily to have prejudiced and influenced the jury to the detriment of the Appellants. The insurance companies' polygraph examiner testified that the plaintiff, in his opinion, had lied concerning the disappearance of the diamond ring. Such evidence could not possibly have been more damning to the plaintiffs' cause. This, notwithstanding the fact that the polygraph examiner admitted that "the polygraph results are no more accurate than the examiner." [Rep. Tr. p. 388, lines 5-6.] It is just such a statement that justifies the Appellants' position that they were maneuvered by the insurance companies into a trap whereby they agreed to be bound by the results of the insurance companies' test conducted and interpreted by the insurance companies' man.

## No Attorney of Record Ever Signed or Assented to the Alleged Stipulation (Exhibit "C").

Contrary to assertions by Appellees in their brief, the attorney of record for the Appellants never signed nor assented to Exhibit "C" (the so-called stipulation). The evidence is uncontradicted that at the time of the polygraph examination of plaintiff, Lee Herman, on April 22, 1965, the attorney of record for Appellants was Charles J. Katz. He was the only attorney of record and was a sole practitioner according to the records in this case. He was not in attendance at the time of the polygraph examination but instead another attorney,

Arnold Shane, was in attendance. As appears from the affidavit of Arnold Shane [Clk. Tr. pp. 58-60], Mr. Shane was associated with the offices of Mr. Katz but that Charles J. Katz was the attorney of record.

It is also to be noted that the polygraph examination was an extra-judicial proceeding and was not a part of the lawsuit. Therefore, Mr. Shane's appearance at that proceeding could not be deemed to be an appearance for and on behalf of Mr. Katz in connection with any regular court proceedings in this action. The plaintiffs had never substituted Mr. Shane for Mr. Katz nor had they agreed to an association of counsel. The only attorney of record for the plaintiffs was Charles J. Katz and he was the only man authorized to sign or assent to a stipulation affecting the conduct of the action.

Appellees assert on Page 11 of their brief that the *evidence* presented to the trial court established that plaintiff, Lee Herman, signed the polygraph agreement on April 22, 1965, when her attorney was present. It is submitted that the only evidence offered by the parties on the question of the date of signing Exhibit "C" consisted of the sworn testimony of plaintiff, Lee Herman, the sworn testimony of defendants' witness, Kenneth W. Scarce (the polygraph examiner), and the sworn affidavit of Arnold Shane. There was no other *evidence* which the trial court considered when determining the validity of Exhibit "C" as a stipulation and the admissibility of the evidence in question, namely, the polygraph examination. The sworn testimony of plaintiff, Lee Herman, and the sworn affidavit of Arnold Shane was that the so-called stipulation [Ex. "C"] was signed prior to April 22, 1965 and prior to the time that plaintiffs were repre-

sented by counsel. The sworn testimony of Mr. Scarce was that he did not know when plaintiff Lee Herman signed Exhibit "C". [Rep. Tr. p. 268, lines 17-23.] On the state of the record of sworn testimony before the trial court, both by oral testimony and affidavit, there was no evidence in the record that would permit a finding by the trial court that the polygraph agreement [Ex. "C"] was signed by Mrs. Herman on April 22, 1965. The only evidence that was in the record indicated that it was signed by her on November 11, 1964 at a time when she was not represented by counsel.

It is uncontradicted that no attorney for Appellants ever signed the alleged stipulation. [Ex. "C".] Appellees' suggestion at page 17 of their brief that Appellants' attorney agreed to the polygraph examination and suggested that it be taken and that Appellants' attorney was present at the time of the examination is unsupported by any evidence in the record. It is directly contrary to the record which disclosed Charles J. Katz as the only attorney of record for plaintiffs at the time in question and that he was not present. The contrary assertions by Appellees represent wishful thinking based on the self-serving hearsay declarations of their counsel at the time of trial and statements of counsel are not evidence.

## Conclusion.

It is submitted that the trial court was in error in finding that there was a stipulation for the admission of polygraph evidence. This error permitted the introduction of evidence which was highly inflammatory and prejudicial to the plaintiffs and prevented plaintiffs from having a fair trial. Since the trial of the

instant case, plaintiffs have filed an action against defendants in the Superior Court of the State of California for the County of Los Angeles, case number 921431, in which plaintiffs have asked for a rescission and cancellation of the so-called polygraph agreements on the grounds of fraud, duress, undue influence, misrepresentation and mistake. This proceeding to rescind and cancel the polygraph agreements would have been taken by Appellants before the trial of this action except that Appellants believed that the polygraph agreements were not binding and the right to object to the polygraph evidence was expressly reserved in the Pre-trial Order. [Clk. Tr. p. 41, lines 4-14.] Appellants have withheld serving the Appellee insurance companies in connection with said action, pending the outcome of this appeal.

It is respectfully urged that this court reverse the judgment below and remand this cause for a new trial. This will permit plaintiffs to have the new trial conducted on a basis that does not deprive them of their rights to a fair trial and plaintiffs will be permitted to pursue their remedies for the rescission of the polygraph agreements so that the polygraph evidence will not be an issue at the re-trial of this cause.

Respectfully submitted,

JAFFE, OSTERMAN & SOLL,
By ARTHUR SOLL,
*Attorneys for Appellants.*

## Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ARTHUR SOLL